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THE ATTORNEY GENERAL
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August 16, 1988

Mr. Charles E. Sirc, Registrar
Bureau of Vital Records and Health Statistics
Health and Welfare Building
6 Hazen Drive
Concord, New Hampshire 03301

Dear Mr. Sirc:

The Bureau of Vital Records and Health Statistics currently has pending a request to permit inspection of the death certificate pertaining to Harold C. Thrasher, late of Keene. The request, made on behalf of The Keene Sentinel newspaper through executive editor Thomas F. Kearney, seeks, inter alia, information about the cause of Mr. Thrasher's demise. Although this opinion is occasioned by Mr. Kearney's inquiry, the issues presented are of some enduring significance, and accordingly we render our advice based in part on considerations that are not peculiar to the factual circumstances giving rise to the specific pending request. We conclude that the requested information should be made available.

Absent specific prohibitive statutory language, courts have held that death certificates are public records and cause of death information generally must be disclosed. For example, in January of this year, an appellate court in New York ordered released to a newspaper the death certificate of a person who was believed to have died of the disease Acquired Immune Deficiency Syndrome. Tri-State Pub. Co. v. City of Port Jarvis, 523 N.Y. S.2d 954, 1138 Misc. 2d 147 (N.Y. App. Div. 1988). In that case, which had been commenced under a state statute analogous to RSA 91-A, the so-called right-to-know law, the court addressed the argument that disclosure of the certificate would infringe upon the right of privacy of the decedent and his next of kin. This claim was rejected by the court on the analysis that New York's right-to-know statute protects only the

privacy of the persons about whom the information is sought to be disclosed and that the right of personal privacy invests only in the living. The Department of Health Commissioner's further argument that New York's public health law permits the disclosure of death certificates only for "proper purposes" was similarly unavailing. To that claim the court responded that AIDS is a disease of great public concern, is a subject of appropriate reportage in the present climate, and is not a topic of "idle curiosity" by newspapers. Other cases in accord with Tri-State Publishing Co. include Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (S. Carol. 1984)(death certificate of homicide victim not exempt from disclosure, where suspect had already been arrested and tried), Meridien Record Company v. Browning, 294 A.2d 646 (Conn. Cir. Ct. 1971)(ordering disclosure of death certificate to newspaper despite the commissioner of health's generalized defense that references to syphilis, miscarriages, cancer, tuberculosis and alcoholism would in the opinion of some constitute an invasion of privacy) and Rome Sentinel v. Boustedt, 252 N.Y.S. 2d 10 (N.Y. Sup. Ct. 1964)(release of death certificate warranted where circumstances of death were newsworthy).

In New Hampshire, death certificates have long been subject to inspection and copying for legitimate purposes. See Abbott v. Prudential, 89 N.H. 149 (1937)(cause of death information on death certificate constitutes prima facie evidence in a judicial proceeding.) As we view it, the broad question for resolution provoked by Mr. Kearney's inquiry is whether any media request for death certificate information may be denied and if so, what criteria should be applied in reaching a determination either to disclose or withhold.

Public inspection of governmental records ordinarily is governed by RSA 91-A. As provided in that statute, public records generally are to be made available for inspection and copying, unless exempted from disclosure under RSA 91-A:V. This latter provision includes among records that are exempt from disclosure "records pertaining to ... medical ... and other files whose disclosure would constitute invasion of privacy." With respect to vital records and health statistics, however, other statutes more precisely and narrowly prescribe the standards to be applied to disclosure requests. Since they are applicable and are more specific than RSA 91-A, in case of a conflict these statutes are determinative of the issues presented. In Re Laurie B., 125 N.H. 784 (1984). Although the questions presented in this instance are answered by resort to the more specific statutes, we acknowledge and decline to casually disregard the purpose of RSA 91-A that the greatest possible public access to the records of all public bodies be ensured. In addition, we believe it particularly helpful and appropriate in this instance to remain mindful of the traditional and constitutionally recognized role of the press in

this State to inform the public on matters that are of interest or concern. Finally, we must also consider that requests for the type of records at issue are not usually predicated on assisting the public in monitoring the conduct of the agency maintaining the records. Requests for death certificates tend to stem more from an interest in the private individuals to whom they refer and to monitoring other agencies that deal with investigation or treatment of causes of death.

RSA 290:1 requires the attending physician to complete a certificate when a person dies, and to include on the certificate all facts required by the Division of Public Health Services as provided in RSA 126:2. The cause or causes of death are expressly mandated to be included on the certificate by RSA 290:1. Death certificates are recognized as vital records in RSA 126:2, 3, and 3-a, and are accordingly subject to the disclosure and confidentiality provisions for vital records set forth in RSA 126:1 and 14. Both of the last mentioned provisions govern disclosure not only of death certificate information, but also of all information with respect to other vital records and health statistics. They thus control the release of information concerning, for example, births, marriages, divorces and fetal deaths. It is self-evident that different considerations may be determinative in deciding whether to disclose information in one of these categories than are important to the same decision respecting disclosure of a death certificate. This opinion therefore may have only incidential relevance to the other categories of records and statistics, and factors which may be significant to determinations about other categories are discussed here only to the extent that they are useful in this analysis applying to death certificates.

As provided in RSA 126:1, II rules are to be adopted to insure "that no information that could possibly adversely affect an identified individual be made public." Reasonably construed, this provision limits to an appreciable extent the information that may be released about an identified living person. We fail to see, however, how the disclosure of information pertaining solely to an identified deceased individual could adversely affect that individual, under the current state of legal jurisprudence in New Hampshire. Were there a recognized right of recovery by an estate for posthumous invasion of a decedent's privacy, our opinion would perhaps be subject to adjustment. Nevertheless, to date no such right having been established either by the Legislature or the Judiciary, it is not an appropriate factor to consider. To be sure, release of details about a person's death may well tarnish his reputation or the memory of him, but the present language of RSA 126:1, II, operating as it does to restrict the ability of the press to report on newsworthy matters, makes us hesitate to read it to include the impact on a deceased person's reputation

within the scope of adverse effects on an identified individual.

This is not to say that RSA 126:1, II recognizes no right of privacy in information contained in death certificates. Should an attending physician include information in a death certificate about an identified living person, under some circumstances that information should well be kept confidential, as disclosure could possibly adversely affect an identified individual. Moreover, there is at least one other statute that recognizes an interest in the confidentiality of certain death certificates. Section 10 of RSA 141-C, relating to communicable diseases, essentially prohibits the public disclosure of identifying information from reports, analyses and compilations. The statute further expressly includes within its reach, reports relating to any person who "was or might have been afflicted with a communicable disease at the time of death." RSA 141-C:7. As you are aware, we have already stated our opinion that RSA 141-C operates to prohibit the disclosure of identifying information from the death certificate of a person with a communicable disease. Opinion of Attorney General, 87-066 (August 28, 1987). We note, however, that other statutes mandating the confidentiality of similar health reports do not specifically refer to deceased persons. E.g. RSA 141-A:5, III (critical health problems such as lead poisoning, Reye's syndrome), RSA 141-B:9 (cancers). It is our opinion that these statutes do not operate to prevent release of death certificates in the same way that RSA 141-C does when the cause of death was a communicable disease. We do not know whether the legislative reason for the distinction between data relating to communicable diseases and other health problems is that a decedent's communicable disease (1) is inherently more embarrassing or humiliating to living relatives or (2) is more likely to be present in remaining members of a decedent's family or close associates. Either basis for the distinction is rational and sufficient.

Whether the interpretive reed upon which we have rested our different conclusions concerning communicable diseases and other health problems be slender or stout, the distinction drawn should govern in the absence of further legislative clarification. We are of this opinion because we believe the result strikes an appropriate balance between the interests of the press and legislative concern for protecting the reporting of health problems by the afflicted and their physicians.

In addition to the limitations on access to vital records and health statistics imposed by RSA 126:1, II, disclosure decisions are also subject to the provisions of RSA 126:14. That section provides generally that information from a vital statistics record shall not be disclosed unless the requestor "has a direct and tangible interest" in the record. The statute gives as the purpose of this requirement the protection of the

integrity of vital records, insurance of proper use of the records, and insurance of the efficient and proper administration of the system of vital statistics. Consonantly, when former Senator Ward Brown explained the provision on the floor of the Senate during adoption in 1977, he noted that the purpose of the requirement was to protect against the fraudulent use of vital records information, such fraudulent use in other states apparently having been the subject of nationwide attention. 1977 N.H. Sen. Journal, p. 2162.

In describing certain applicants who have a direct and tangible interest, RSA 126 provides in section 14, IV:

> Properly qualified members of the press, radio, television and other news media shall be considered to have a direct and tangible interest in vital statistic records when the information requested by such media sources is of a public nature.

In explaining what media requested information the Legislature considered to be of a public nature, Senator Brown stated "members of the press have availability ... provided it is of public nature, in other words, of interest to the public." 1977 N.H. Sen. Journal, p. 2162. This comment reflects what is known to us as a matter of historical experience, viz., that legitimate media interest in a subject often largely defines what is of a public nature. Where there is legitimate media interest, death certificate information is of a public nature unless there is a strong countervailing interest in confidentiality. In the case of certificates revealing a communicable disease, the interest in confidentiality has been legislatively established. There may in certain circumstances be an overriding law enforcement investigative interest in keeping cause of death information confidential for a limited period of time. A media request ostensibly based on newsworthiness may indeed be so broad as to be based on idle curiosity or may present a strong risk of fraudulent misuse of information if publication occurs. In such circumstances, upon the advice of this office, a media request may be denied. To protect the sensitive interests extant in the case of a communicable disease, the specific reason for the denial based on any of the preceding circumstances should not be given. After careful consideration, we are at this time aware of no other circumstances in which the Bureau should decline to grant a media request for death certificate information.

It is our understanding that the death certificate of Harold Thrasher does not contain information of the type described in the foregoing portions of this opinion. Mr. Kearney's request for inspection should therefore be granted. In addition, Division of Public Health Services rule PART Vit 703 should be reviewed to ensure that it is applied consistently with this

opinion. Specifically, sections Vit 703.02(a)(3) and (a)(4) should be reviewed. They provide:

> (3) Under the provision of RSA 126:1, II, however, "no information that could possibly adversely affect an identified individual or their family" shall be made public.
>
> (4) The cause of death information on a death certificate shall not be accessible to the media and not be considered of a "public nature" unless it is shown by the requestor to the satisfaction of the state registrar to be of benefit to the public.

When a media request is made for death certificate information, as opposed to information from other vital statistic records, Vit 703.02(a)(3) should not be applied. Additionally, in determining whether disclosure would be of "benefit to the public" under Vit 703.02(a)(4) the state registrar is constrained by this opinion to deciding (1) whether the requestor could reasonably determine that the information would be of interest to the public and (2) whether the newsworthiness determination is overridden by a confidentiality interest identified in this opinion.

Should you have any questions regarding the implementation of this opinion, please do not hesitate to contact this office.

Very truly yours,

Jeffrey R. Howard

Jeffrey R. Howard
Deputy Attorney General

JRH/p

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